THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF SEATTLE, Defendant.	)	Case No. 2:12-cv-01282-JLR **CITY OF SEATTLE'S REPLY BRIEF ON COURT'S ORDER TO SHOW CAUSE**

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I. INTRODUCTION

Defendant City of Seattle (City) respectfully submits this reply to the responses filed by the U.S. Department of Justice (DOJ) and the Community Police Commission (CPC) regarding the Court's December 3, 2018 Order to Show Cause. The collective bargaining agreements (CBAs) reached between the City and police officer unions represent important progress and significantly advance the City's goals of police accountability. A single, erroneous arbitration decision reinstating an officer who was terminated by the Chief of Police—a decision that the City is vigorously seeking to overturn—likewise does not demonstrate that SPD is no longer in full and effective compliance with the Consent Decree.

The Consent Decree constitutes a settlement agreement negotiated between the City and the United States to address DOJ's finding that SPD had engaged in a pattern or practice of excessive force. The Consent Decree imposes extensive policy, operational, and training requirements on SPD, which can be loosely grouped into six main areas: use of force; responding to people in crisis; stops and detentions; bias-free policing; supervision; and the collection and tracking of data on policing. Compared to the requirements in these six areas, the Consent Decree requirements related to the police disciplinary system and misconduct investigations are more limited in nature, as set forth in paragraphs 165-67 and in the accompanying Memorandum of Understanding (MOU).[1] The Consent Decree does not mandate changes to Seattle's police

[1] The Consent Decree states: "DOJ found that the OPA system is sound and that investigations of police misconduct complaints are generally thorough, well-organized, well-documented, and thoughtful." Consent Decree ¶ 164. However, the Decree does require the OPA Manual to be updated in order to "formalize OPA's procedures, best practices, and training requirements." ¶ 167. It also requires revisions to SPD's policies on reporting misconduct and retaliation. ¶ 165-66. Finally, the Consent Decree contains SPD's commitment to strive to ensure that all complaints against officers are fully and fairly dealt with, ¶ 164; to that end, the parties agreed to related terms in the MOU, which is available at

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accountability structure, but the parties acknowledged that SPD's accountability structure could evolve and provided that the CPC would review it and make recommendations. MOU ¶ 15.

SPD has implemented comprehensive reforms affecting nearly every aspect of its operations in the six areas mandated under the Consent Decree.[2] Between September 2015 and June 2017, the Monitor conducted ten systemic assessments, which comprehensively measure SPD's progress in complying with each area of the Consent Decree. On January 10, 2018, the Court found that the City had achieved full and effective compliance. Dkt. 439. The City must now sustain compliance for two years. Consent Decree ¶¶ 229-30.

For nearly seven years, the Court has ensured that the City meets the requirements of the Consent Decree and continues to provide constitutional policing through regular reviews, status conferences, and assessments by the Court's monitor. However, as this Court has itself recognized, and contrary to CPC's suggestion, it is not the role of the Court to intervene in the decision making of the City's elected officials, unless those decisions conflict with the Consent Decree.

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https://www.justice.gov/sites/default/files/crt/legacy/2012/07/27/spd_mou_7-27-12.pdf.

[2] In addition to the reforms that have been accomplished under the Consent Decree, SPD is engaging in other reforms that are driven by new state requirements. Initiative 940 was enacted statewide last November by nearly 72% of Washington voters, removing the "malice" element under prior law for prosecuting officers who wrongly use deadly force, and mandating independent investigations of officer-involved deaths, among other provisions. The City is helping to assist in formulating the statewide rules implementing I-940. *See* January 3, 2019 letter to CPC Co-Chairs Walden & Ruiz from Mayor Durkan, City Attorney Holmes and Chief of Police Best, attached hereto as Exhibit J.

Early last October, King County Executive Dow Constantine announced significant reforms to the inquest process under RCW Ch. 36.24, Section 895 of the King County Charter, and KCC Ch. 2.35A for officer-involved deaths. The new inquest process is expected to be in operation by the end of the first quarter of 2019. *See* https://www.kingcounty.gov/elected/executive/constantine/news/release/2018/October/03-inquest-reform.aspx. The City is working with the County now to implement the new inquest procedures.

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Presently before the Court are the CBAs, negotiated by the Mayor and approved by City Council; the Accountability Ordinance as modified by the collective bargaining process; and the Consent Decree governing this litigation. The Accountability Ordinance (Ordinance or AO) specifically states that its provisions do not take effect until collective bargaining is completed, *see* § 3.29.510(A), yet the CPC asks the Court to direct the City to implement all the provisions of the Ordinance as they existed before collective bargaining.

The Court framed its review of the SPOG CBA (which was then a tentative agreement) in its October 23, 2018 Order:

> Whether or not the [tentative agreement] is consistent with the City's Accountability Ordinance is of interest to the court only to the extent that changes to that Ordinance may implicate the Consent Decree. Similarly, the court's interest in the collective bargaining process is based solely on its concern with the City's and SPD's successful completion of Phase II of the Consent Decree and the City's and SPD's continued compliance with the Consent Decree.

Oct. 23, 2018 Order at 2 n.2 (Dkt. 485).

Significantly, neither CPC nor DOJ claims that the CBAs violate the U.S. Constitution or any other provision of federal law. Moreover, neither DOJ nor CPC dispute that the CBAs achieve numerous, concrete reforms that will improve the City's *current* system of police accountability and discipline.

Sidestepping the terms of the controlling Consent Decree, the CPC instead focuses almost exclusively on the Accountability Ordinance as it was originally enacted—*before* collective bargaining by the City's elected chief executive, and *before* ratification of the CBAs by the City's elected legislators. In the process, CPC glosses over two critical facts: First, the Ordinance largely addresses matters outside the requirements of the Consent Decree. Second, the Ordinance expressly did not take effect until its provision were collectively bargained, as required by state

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labor law. Thus, even if "progress" were the legal benchmark against which the CBAs were being measured, the reference point would have to be the City's current system of police accountability. CPC's brief does not contest that the CBAs represent progress when measured against that benchmark.

The City respectfully requests the Court to find that the City remains in full and effective compliance with the Consent Decree and to return the focus to the City's efforts to advance continuous police reform and carry out the requirements of the Sustainment Plan.

II. ARGUMENT

A. The CBAs Do Not Conflict with the Consent Decree; Rather, They Build Upon the Consent Decree Reforms by Advancing the City's Goals for Police Accountability.

The City's opening brief highlighted five major areas in which the CBAs strengthen the police accountability system. *See* City's Br. 16-27. All of these important advances are uncontested in the briefing before the Court. Significantly, the Plaintiff, DOJ, concludes that the CBAs do not conflict with the Consent Decree. *See* DOJ's Br. at 3.

As noted above, Amicus, CPC, does not dispute the fact that the CBAs improve upon the City's *current* police accountability system. Rather, CPC complains that collective bargaining did not result in full implementation of the Ordinance and contrasts the real accomplishments of the CBAs with CPC's ideal system.[3]

[3] In addition to its brief, CPC submitted a declaration that comprises fifty-seven pages of legal argument and opinion testimony critical of the CBAs and many pages of exhibits. The City does not endeavor to address the parts of this declaration which are not adopted in CPC's brief and amount to the opinions of one person. *See Singh v. Soraya Motor*, No. C17-0287-JCC, 2017 WL 8728124, at *2 (W.D. Wash. Oct. 26, 2017) ("Declarations are not the place for legal argument.").

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The gains achieved in the CBAs are addressed more fully in the City's opening brief (at pp. 15-27) and summarized below:

The Office of the Inspector General for Public Safety ("OIG") can now exercise its authority to audit and oversee the SPD. The Ordinance created the new OIG, but without successful collective bargaining, many of its provisions regarding the OIG could not take effect. AO §§ 3.29.240 & 3.29.510(A). As a result of the new CBAs, OIG is now authorized to review and audit SPD's handling of major incidents including those involving death, serious injury, and serious use of force. *See* AO § 3.29.240(G); Exhibit B at 80. Among other authorities, OIG has "full and unfettered access" to the operations of the Department, access to "any incident scene," and the ability to participate in Office of Police Accountability (OPA) investigations and Force Investigation Team reviews. *See* AO §§ 2.29.240(G)(1) & G(2); CBA App. E.12 (Exhibit B at 87).

The CBAs make OPA investigations more efficient and effective. The CBAs provide for the civilianization of several OPA positions previously held by uniformed officers and make it easier for OPA to meet the requirements to provide notice of new complaints to the named officer (no longer requiring that each and every potential rule or policy violation be identified). Ex. A at 52-53; Ex. B at 79. The SPOG CBA also modifies the 180-day investigation timeline so that the clock no longer starts when a supervisor merely receives a complaint, but rather when the supervisor takes affirmative action to ensure the matter will be reviewed and investigated. Ex. B at 9-10. In addition, the new SPOG agreement provides that, if material new evidence—such as new video or complaint from a community member—surfaces after the chain of command has already investigated and concluded that no misconduct occurred, the clock is reset and the OPA can take the full 180 days to investigate starting from the date the new evidence was discovered. Ex. B. at 10.

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The CBAs give the Chief greater authority over and flexibility to make supervisory decisions. Critically, the CBAs for the first time allow the Chief to suspend an officer *without pay* pending investigation for gross misdemeanors alleging moral turpitude, or a sex or bias crime, where the misconduct could lead to termination.[4] Ex. B at 6. Previously, the Chief was only allowed to impose unpaid suspensions for felonies. *See* Exhibit C at 9. In addition, the new Article 3.8 in the SPOG CBA allows minor policy violations to be handled as a performance concern rather than a formal OPA matter; this provision is intended to empower supervisors to address small problems quickly, before they become larger problems. Ex. B at 16-17.

SPOG's challenge to SPD's body-worn video policy is withdrawn, allowing this important policy reform to proceed unimpeded. SPOG had previously filed an unfair labor practice complaint seeking to overturn the 2017 Mayoral Executive Order mandating the use of body-worn video (BWV). As a result of the SPOG agreement, the Guild has now withdrawn this unfair labor practice. *See* Ex. B. at 94. The SPD's body-worn video policy is mandatory; *officers cannot opt out of the requirement*. *See* Seattle Police Manual § 16.090; Ex. B at 39-40. If an officer wears a uniform, then he or she must wear a camera. There is no longer a risk of litigation delaying or rolling back this important reform. Once again, CPC does not reference this significant addition to police accountability.

The Disciplinary Review Board (DRB) has been eliminated. In place of the DRB, the CBA adopts a new method for selecting an arbitrator, which the City anticipates will lead to faster processing of appeals. Ex. C at 12-14. In addition, a new mechanism limiting the abilities of the

[4] CPC's brief could be read to suggest the opposite. *See* CPC Br. at 14 & n.48, 22. Again, CPC is using as its point of reference a provision of the Ordinance which never took effect.

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parties to veto potential arbitrators was adopted in order to prevent gaming of the selection process. Ex. B at 60-66. Finally, police officers no longer participate as decision makers on appeal. *Id.*

B. The Parties Agree that the Shepherd Decision Does Not Present a Conflict with the Consent Decree, and CPC Does Not Dispute that Analysis.

DOJ raises only one potential issue with respect to the Consent Decree. That issue arises out of testimony given at the Shepherd DRB hearing about the Defensive Tactics Training that SPD provided to Shepherd. The DRB ruled, unequivocally, that SPD's policy at the time was clear and that Shepherd violated it. Ex. F at 20-21. The City agrees that the testimony about training cited in DOJ's brief is contrary to the reforms SPD has made, and to SPD's use of force policy and written training materials. The policy and training materials were approved by the Monitor[5] and the Court in 2013 and 2014. Dkts. 107, 111, 115, 144, 153. The testimony is also contrary to the Department's training philosophy and techniques: SPD's Training Section teaches skills and sound decision-making to officers and supervisors, not automated responses to force. *See* Dkt. 144 (*Monitor's Mem. Re Instructional System Design Model For Use of Force Training*).

The City and SPD welcome the opportunity to have DOJ and the Monitor re-evaluate SPD's Defensive Tactics training. The Monitor and DOJ first attended and evaluated the live training in 2015. *See* Dkts. 195 at 3 & 212 at 16. The City is confident that SPD's Defensive Tactics training continues to provide high-quality, effective instruction that is consistent with the Fourth Amendment and the Consent Decree, as well as the Department's policies, values, and philosophy on use of force.

[5] In its Fourth Semiannual Report, the Monitor wrote, "SPD's use of force policy . . . is the embodiment of the Consent Decree. It provides officers with clear guidance and expectations consistent with constitutional imperatives." Dkt. 187 at 16.

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Adding this re-evaluation to the Sustainment Plan will be an important step to ensure the public's confidence in the training. The City, accordingly, stipulates to DOJ's proposed order to add re-evaluation of SPD's Defensive Tactics training to the Sustainment Plan.

C. The Accountability Ordinance, as Modified by the CBAs, Is the Result of the City's Democratic Process and Good-Faith Collective Bargaining.

As this Court has recognized, the Washington State Public Employees' Collective Bargaining Act (PECBA), RCW 41.56, required the City to collectively bargain all aspects of the Accountability Ordinance that affect "mandatory subjects of bargaining," including wages, hours and working conditions. *See* Court's Sept. 7, 2017 Order (Dkt. 413); *see generally Int'l Ass'n of Fire Fighters, Local Union 1052 v. Pub. Employment Relations Comm'n*, 778 P.2d 32, 35 (Wash. 1989) (interpreting bargaining requirement of PECBA).

As a result, provisions of the Ordinance were modified in the bargaining process. This outcome was compelled by the PECBA for two reasons. First, the City is required to engage in "good-faith bargaining" with its labor unions. RCW 41.56.030(4). Second, state law requires that bargaining must start from the "status quo," not a set of principles set out by the employer. *See Kitsap County*, Dec. 12163-A (PECB 2015) (Bad-faith bargaining can include "entering negotiations with a take-it-or-leave-it attitude[] or approaching bargaining with an attitude that bargaining is from scratch."). These requirements meant that the City had to exercise its judgment and bargain at the table. It could not simply impose the Ordinance as it was originally enacted. The City cannot align the CBAs with the Ordinance without engaging in prohibited "take-it-or-leave-it" or "surface" bargaining. *See City of Snohomish*, Dec. 1661, 1661-A (PECB 1984).

When the Ordinance was passed, the City's elected leaders understood that they were operating within this framework. In the text of the Ordinance, they made explicit their commitment

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to collective bargaining, providing that all provisions "subject to [PECBA] shall not be effective until the City completes its collective bargaining obligations." AO § 3.29.410(A). In its brief, CPC does not acknowledge that these provisions of the Ordinance never took effect, and that the law contemplated that bargaining was required.

CPC also understood that the Ordinance would be modified in collective bargaining. At a January 2017 status hearing, CPC informed the Court that "there is no doubt that some of the features of proposed reforms that we recommended are mandatory subjects of bargaining." Jan. 4, 2017 Status Conf. Trans. at 28:5-13. CPC also asserted, "[w]e do not believe that in order to move this reform process forward or the settlement agreement process forward, the City needs to compromise the collective bargaining rights of its unions." *Id.* at 22:14-18. Until now,[6] the CPC had not suggested that the City had the right to avoid good-faith bargaining under Washington law.

The Accountability Ordinance, as modified by the CBAs, is the result of the City's democratic process. The original Ordinance was debated and enacted by the City Council and approved by the Mayor. The City engaged in good-faith negotiations with both unions, led by the Mayor and in consultation with the City's Labor Relations Policy Committee. *See* SMC § 4.04.120. The City's elected representatives reviewed the resulting CBAs and determined that they achieved an acceptable compromise that fulfills the City's goals for police accountability, and determined that the City had met its obligation to bargain in good faith. The subsequent ordinances approving the CBAs and modifying the Accountability Ordinance were then enacted by the City Council and the Mayor. In other words, the Ordinance was legally amended through legislative

[6] *See* CPC's Br. 1-3, 26-28; *see also* Levinson Dec. ¶¶ 34 ("[T]he public was promised that, where bargaining was required, the City would bargain so that these reforms could be fully implemented").

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action. The CPC now seeks to set the clock back and overturn this process, arguing that the only acceptable accountability system is the one set out in the original Ordinance. CPC's Br. at 1-3, 26-28. There is no authority for this assertion.

D. CPC's Requested Relief Is Contrary to Law.

CPC asserts incorrectly that the question before the Court is "whether the CBAs will result in a less robust police accountability system for this community than that recommended and enacted in the Accountability Ordinance and other laws and policies that, taken together, form the accountability system." CPC's Br. at 3. For its requested relief, CPC asks this Court to rule that the Consent Decree requires a wholesale adoption of the Accountability Ordinance's terms without participation in collective bargaining. CPC's Br. at 28 (Court should "convey to the City that the CD will not be resolved until the City establishes that the accountability system reforms have in fact been secured."). CPC thus asks the Court to set aside over six years of successful reform, its previous finding of full and effective compliance, and the results of the City's democratic process.

CPC's position that the Consent Decree requires full implementation of the Accountability Ordinance is legally untenable. As an initial matter, such an interpretation of the Consent Decree is at odds with the understanding of both of the parties that entered the Consent Decree. As DOJ states in its response, the Consent Decree largely left the City's accountability system intact and, instead, included only an MOU requirement that the CPC review the accountability systems and make recommendations. DOJ's Br. at 10; MOU ¶ 15; Consent Decree ¶¶ 165-67.

However, even if the parties had intended to require a wholesale adoption of the CPC's recommendations regarding SPD's accountability systems, without collective bargaining, they would have been legally barred from doing so. The parties "could not agree to terms which would exceed their authority and supplant state law." *Keith v. Volpe*, ("Keith III"), 118 F.3d

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1386, 1393 (9th Cir. 1997). The Ninth Circuit has held that "a contractual consent decree entered by a federal district court can[not] override valid state laws." *Id.* at 1392-94. Similarly, "[e]xcept as part of court-ordered relief after a judicial determination of liability, an employer cannot unilaterally change a collective bargaining agreement as a means of settling a dispute over whether the employer has engaged in constitutional violations." *United States v. City of Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002) (holding that police union could intervene as of right in consent decree between United States and Los Angeles under 42 U.S.C. § 14141).

The City complied with its collective bargaining requirements. Yet, CPC now asks the Court to disregard state law and to set aside the results of the City's democratic process, arguing that the only acceptable accountability system is the one set out in the original Ordinance. CPC bases this request on the incorrect assessment that the CBAs violate the Consent Decree. Moreover, as stated above, the City could not violate state labor law and unilaterally implement the original version of the Accountability Ordinance without bargaining.

It is important to note what CPC is *not* arguing. No assertion has been made by CPC or DOJ that the CBAs violate the Constitution or any other provision of federal law.[7] CPC's brief does not cite to or even mention the U.S. Constitution. Indeed, the CBAs make the City's systems of police discipline and accountability more robust, which plainly does not violate federal law.

[7] To illustrate, CPC asserts that meaningful police discipline is impossible if officers have the right to appeal disciplinary decisions to an arbitrator. CPC's Br. at 12. But CPC does not claim that allowing arbitration violates federal law, and for good reason. Both DOJ and CPC rely on the same labor law expert for the proposition that arbitration is a right widely afforded to police officers throughout the country. Rushin Decl. ¶ 3; CPC's Br. at 12; Levinson Decl. ¶ 25. The City does not interpret CPC to assert that police departments are universally in violation of the U.S. Constitution.

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The Ninth Circuit in *Keith III* squarely addressed the CPC's suggestion that the Court use the Consent Decree as a tool to relieve the City of its state-law obligation to bargain in good faith. *Keith III*, 118 F.3d at 1392-94 (evaluating whether "a contractual consent decree entered by a federal district court can override valid state laws regulating outdoor advertising that are not in conflict with any federal law"). There, the consent decree at issue was negotiated to resolve an environmental lawsuit brought against co-defendants, the United States and the State of California.[8] Like the Consent Decree here, the decree provided the federal court with continuing jurisdiction to enforce its terms. *Keith III*, 118 F.3d at 1390. As required by the decree, California stopped granting permits for billboards along Interstate 105. *Id.* at 1392. California law, however, allowed such advertising. *Id.* at 1389. A developer challenged, and the district court held that the consent decree superseded the conflicting state law. *Id.* at 1389-90. The Ninth Circuit vacated and explained:

> Under the Constitution, the district court could not supersede California's law unless it conflicts with any federal law. U.S. CONST. AMEND X; *see, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800-02 (1995). Here, there simply was no federal law to justify the district court's superseding of state law. Although the court referred to "the important federal policies vindicated by the [Consent] Decree," the court failed to identify a single federal law that would justify its overriding state law.

118 F.3d at 1393. Similarly, in this case, even if the CBAs conflicted with the Consent Decree (which they do not), the CBAs present no violation of federal statutory or Constitutional law that could justify relieving the City of its obligation to collectively bargain.

[8] *Keith v. Volpe*, ("Keith I"), 784 F.2d 1457, 1458-59 (9th Cir. 1986). This opinion resulted from the third appeal to the Ninth Circuit in this case. Details of the factual background and legal dispute are set forth in the Ninth Circuit's first opinion, *Keith I*. *Id.* at 1458-60.

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CPC cites two cases in support of its claim that this Court should "craft a way forward" and require the City to "establish[] that the accountability system reforms have in fact been secured." CPC's Br. at 27-28 & 27 n.8. Neither of these cases support CPC's argument.

The first case is the Ninth Circuit's first *Keith* opinion. *Keith v. Volpe*, ("Keith I") 784 F.2d 1457 (9th Cir. 1986). *Keith I* held that it was not an abuse of discretion for the district court to have "fleshed out a decree that was silent on a procedural point." 784 F.2d at 1461. Here, CPC does not claim that the Consent Decree is silent on a procedural point. CPC appears to be asking the Court to add new, substantive obligations to the Consent Decree, contrary to the principle recognized by the court in *Keith I*: "[w]hen a decree is silent on a substantive issue, courts are reluctant to impose additional burdens, because the parties could have bargained for and included an absent provision if they had so desired." *Id.* at 1461.

Next, CPC cites to *United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1985). There, the district court determined that the State of Oregon had violated Indian Tribes' federal treaty fishing rights and fashioned relief to vindicate those rights. *Id.* at 1417 ("The court found a violation [of federal treaty law], and issued the injunction to protect and define the Tribes' rights under the treaty."). Here, in contrast, there has been no assertion that the CBAs conflict with federal statutory or constitutional law.

E. CPC Makes Several Arguments that Are Inapposite to the Issues Before the Court.

By asserting that the compromises made during collective bargaining will undermine the public's confidence in the Department, CPC attempts to connect the following issues to the Consent Decree: secondary employment for officers; the retention of arbitration for disciplinary appeals; and the burden of proof applicable in arbitration. CPC's Br. at 22-23. Although these

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issues are not addressed by the Consent Decree, the City nevertheless responds at length below, because these issues could have important implications for public confidence and the police accountability system.

i. CPC's claim that the CBAs maintain the current system for secondary employment is incorrect.

CPC claims that secondary employment is an area where Consent Decree "gains" are "undermined." CPC's Br. at 22. Secondary employment is an important policy topic, but it is not included in DOJ's investigation findings, nor is it mentioned in the Consent Decree. *See* Dkts. 1-1 & 3-1. In addition, the CPC's assertion that "the SPOG contract explicitly maintains" the current secondary employment system is incorrect. CPC's Br. at 25. The Accountability Ordinance and the 2017 Executive Order[9] by then-Mayor Burgess require the City to develop a new system for secondary employment. AO § 3.29.430(D). That effort is still under way but had not been completed when CBA negotiations took place. The reopener provisions of the CBAs allow the City to reopen and bargain this issue with the Guild. Ex. B at 74. However, the topic of Secondary Employment requires resolution of a range of complicated legal, personnel, and technical issues.

CPC's claim that the executive misled the Council on secondary employment is similarly unfounded. Instead the documents cited actually show the opposite. Ex B to Lopez Decl. at 14.

ii. There is no basis for the CPC's contention that restricting disciplinary appeals to the Public Safety Civil Service Commission (PSCSC) would improve accountability.

The CPC asserts that the continued use of arbitration for disciplinary appeals, rather than requiring all appeals to be heard by the PSCSC, inappropriately retains "an appeals system . . .

[9] Available at http://www.seattle.gov/Documents/Departments/Mayor/Executive-Order-2017-09-Secondary-Employment.pdf.

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likely to result in more cases in which discipline is overturned on appeal." CPC's Br. at 13. First, in any system that affords due process there will be instances when disciplinary decisions are overturned. Second, CPC's assertion that a civil service commission will overturn fewer cases than arbitrators is unsupported.

The CPC argues that the record of arbitration in SPD matters is unacceptable, noting that disciplinary terminations were reversed two times and sustained four times over the past fifteen years. CPC's Br. at 13. The CPC has not explained how two reversals in fifteen years constitutes an unconstitutional system. Importantly, the CPC's preferred alternative—the PSCSC—has also reversed the Chief's disciplinary decisions. In the PSCSC's history, disciplinary terminations made by SPD have been reversed by the Commission three times and sustained four times.[10] Those numbers are comparable to arbitration; if anything, over the long run, SPD has fared slightly better in arbitrations.

CPC claims that the PSCSC will provide greater accountability in the future, because of the changes that the Ordinance made to it. CPC's Br. at 10-12. Contrary to CPC's suggestion, however, the Ordinance makes only minor changes to the City's public safety civil service system.[11] The CPC points out that Commissioners must now be selected "through a merit-based process," but that language is the full extent of the new direction for PSCSC appointments. AO § 4.08.040(A). Commission members still will be appointed by elected officials, as they are now.

[10] These results are publicly available at https://www.seattle.gov/public-safety-civil-service-commission/findings.

[11] The Ordinance makes two changes. First, it specifies that appointment to the Commission shall be "merit-based" but does not identify that term and does not alter the fact that appointment is made by elected officials. AO § 4.08.040(A). Second, it removes the elected member from the Commission. *Id.*

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Id. CPC's contention that the PSCSC will be somehow more favorable to SPD management is not only pure speculation, but implies there should be a skewed system that favors the employer in appeals.

CPC is also incorrect about the amount of deference afforded by PSCSC to the Chief of Police's disciplinary determinations. The CPC asserts that arbitration should have no role in the accountability system, because an arbitrator is not "required to defer to the Chief." CPC's Br. at 10. However, the Accountability Ordinance did not mandate that the PSCSC provide any greater deference to the Chief's disciplinary decisions than that shown by arbitrators.[12] The Ordinance provides that the decision of the Chief will be affirmed "unless the Commission specifically finds that the disciplinary decision was not in good faith for cause," which is identical to the existing PSCSC standard. *Compare* AO § 4.08.105(A)(3), *with* SMC § 4.08.100(A). CPC relies on the "good faith for cause" standard to suggest that under the Ordinance the PSCSC must provide deference to the decision of the Chief. CPC's Br. at 10. However, this is incorrect. The "good faith for cause" standard is comparable to the "just cause" standard used by arbitrators. *See* Ex. B at 81 (specifying "just cause" standard); *City of Seattle v. City of Seattle*, 230 P.3d 640, 645-46 (Ct. App. Wash. 2010) (affirming that it was appropriate for PSCSC to use the same seven-factor test in its "good faith for cause" analysis as arbitrators traditionally apply in "just cause" analysis). The CPC's arguments misstate the labor law relating to disciplinary appeals.

[12] In fact, CPC's interpretation of the Ordinance would bring it into conflict with the state law that gives the PSCSC authority to modify disciplinary decisions. *See* RCW 41.12.090.

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iii. CPC's argument about the SPOG CBA's burden-of-proof provision is both inaccurate and at odds with established principles of labor law.

CPC identifies only one contract provision that it claims will worsen the status quo: Article 3.1 of the SPOG CBA which addresses the burden-of-proof for arbitration. CPC's Br. at 12-13, 19-21. CPC's argument is unfounded. Article 3.1 will not make it harder for SPD to address serious misconduct.

The CPC is incorrect in stating that, "under the Accountability Ordinance, the required standard of review was a preponderance." CPC's Br. 11. In fact, the Ordinance contains no mention of evidentiary standards apart from section 3.29.135(F), which applies only to dishonesty cases and requires "the same evidentiary standard used for any other allegation of misconduct." The Ordinance's silence on the evidentiary standard means that the PSCSC may continue to use its existing rules. According to these rules, where the issue is suspension or termination, the City has the "burden of showing that is action was for good faith with cause. At any other hearing, the petitioner or appellate shall have the burden of proof by the preponderance of the evidence." PSCSC Rule 6.11.[13]

More importantly, Article 3.1 represents a continuation of existing practices, not a new "elevated standard." The specific language from Article 3.1 of the SPOG CBA provides that "the standard of review and burden of proof in labor arbitration will be consistent with established principles of labor arbitration." Ex. B at 6. The only change brought about by that provision is that the review of a dishonesty offense no longer automatically requires the City to prove the

[13] The PSCSC rules are available at https://www.seattle.gov/Documents/Departments/PSCSC/NewsUpdates/PSCSC%20Rules%20Final_Amended%201-17-19.pdf.

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misconduct by clear and convincing evidence. Ex. C. at 9. Rather, the evaluation of the burden applicable in a dishonesty case is subject to the same established principles of labor arbitration as all other discipline cases. Ex. B at 6. As an example of those established principles, the parties recognized that arbitrators often apply an elevated standard for certain termination cases where a termination would be so stigmatizing as to make it difficult for the officer to continue working in law enforcement. *Id.* As explained in the City's opening brief, arbitrators already generally apply an elevated standard of proof for offenses that are stigmatizing to this extent and have done so for a long time.[14] City's Br. at 25-27.

CPC claims incorrectly that the arbitrator's decision in Shepherd provides a counterexample to the City's position that arbitrators already apply an elevated burden of proof for stigmatizing offenses. CPC's Br. at 11. In fact, the Shepherd decision exemplifies how arbitrators commonly require an increasing quantum of proof in proportion to the severity of punishment. The DRB applied a preponderance of the evidence standard in finding that the City had proved that Shepherd violated SPD policy. Ex. F, DRB Op. & Award at 12. Then, however, the DRB decided that termination was too severe a punishment, in part, because the City only proved its case by a preponderance of the evidence. Ex. F at 23 ("[T]his violation was certainly not proven beyond a reasonable doubt, or even, perhaps by clear and convincing evidence. The assessment of culpability appears to be one over which reasonable minds differ."). Thus, the arbitrator required something more than a preponderance to impose the punishment of termination.

[14] CPC asserts that neither the City nor "DOJ . . . provide[d] documentation validating th[e] assertion" that, in the past fifteen years, four of six SPD terminations were upheld by the DRB. CPC's Br. at 13 & n.40. On the contrary, the City, upon request, provided to DOJ all six arbitration decisions involving termination of an SPD officer over the past 15 years. DOJ submitted those materials with its response brief as Exhibits B through G.

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CPC claims that Article 3.1 requires arbitrators to apply an elevated burden of proof for all termination cases, because termination is always stigmatizing, but cites no authority for its claim. CPC's Br. at 11. In fact, the CPC's argument regarding the use of the word "stigmatizing" is implausible as a matter of contract interpretation, because it would render much of the provision's language superfluous. In other words, CPC is saying that "for termination cases where the alleged offense is stigmatizing to a law enforcement officer, making it difficult for the employee to get other law enforcement employment" actually means "for all termination cases." *See Seattle-First Nat. Bank v. Westlake Park Assocs.*, 711 P.2d 361, 364 (Wash. Ct. App. 1985) ("An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless or ineffective."). Moreover, "stigmatizing" is not an undefined term; rather it has an accepted and narrower meaning in this specific legal context. It is generally recognized, for example, that termination offenses such as absenteeism do not rise to the level of stigmatizing. *See* Exhibit H at 15-27 (Elkouri & Elkouri, *How Arbitration Works*, 15-27 (8th ed)) (contrasting "ordinary discipline and discharge cases" with those involving, e.g., "criminal behavior" or "moral turpitude").

Thus, the CBA language does not expand the imposition of a heightened standard; rather, it memorializes existing, established standards.

F. CPC's Brief Contains Numerous, Additional Inaccurate Statements of Law and Fact.

In its brief (and attachments), the CPC diverges significantly from its previous positions in this case. In 2017, the CPC acknowledged that the Ordinance would be altered through collective bargaining. Jan. 4, 2017 Status Conf. Trans. at 28:5-13. In 2018, the CPC stated that its primary concern with the SPOG CBA was the burden of proof in disciplinary proceedings. Nov. 5, 2018

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Status Conf. Trans. 37:13-18. In its present filing, however, the CPC has chosen to extensively oppose the CBAs. The CPC's criticisms are undermined by numerous inaccuracies regarding labor law, municipal law, and the meaning of contractual terms. The City does not attempt to counter all of them here. The most important errors are addressed below:

OPA Interview Locations. CPC claims that an arbitrator or SPOG could insist that OPA interviews be held somewhere other than OPA, because the CBAs provide that interviews will take place in an "Seattle Police facility." CPC's Br. 17-18. That argument ignores the longstanding practice that OPA interviews are conducted at the OPA. *See* OPA Manual at 29.[15] The language in the new CBA concerning interviews at a police facility has not been changed. Ex. C at 27. As such, the only plausible contract interpretation is that there will be no change in existing practice. *See* Elkouri & Elkouri, *How Arbitration Works*, 12-21 (8th ed) (treatise excerpt is provided as Exhibit K to this filing) ("Where practice has established a meaning for language contained in past contracts and continued by the parties in a new agreement, the language will be presumed to have the meaning given it by that practice."). In addition, since OPA organizationally is part of the SPD, an interview conducted at OPA is conducted in a Seattle Police facility.

OPA's Role in Criminal Investigations. CPC claims that OPA's role in coordinating parallel criminal and civil investigations has been eliminated by the CBAs. CPC's Br. at 22. To the contrary, the SPOG CBA provides that OPA has "responsibility to coordinate its investigations with criminal investigators and/or prosecutors from the City or other jurisdictions." Ex. B at 82. That language is consistent with the language from the Ordinance in section 3.29.100(G).

[15] Available at https://www.seattle.gov/Documents/Departments/OPA/manuals/2016_04_01_OPA_Manual_Court_Approved.pdf.

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Scope of Conflict Between the CBAs and the Ordinance. The CPC misconstrues the provisions in the CBAs that address conflict between the CBAs and the Ordinance, suggesting that even "implicit" conflicts could cause the Ordinance language to be superseded given the "open-ended scope of this preemption clause." CPC's Br. at 16. That is incorrect. The SPOG CBA, which was enacted by ordinance, provides that City ordinances are paramount to the CBA "except where they conflict with the *express provisions* of this agreement." Ex. B at 71. Similarly, the CBAs recognize that the entire Accountability Ordinance can be implemented except where the actual "language" of the CBA and the Ordinance are in conflict. Ex. B at 81. There is nothing open-ended in the language adopted by the parties. The CPC also references case law recognizing the dominance of collective bargaining over other state statutes, but that case does not address how to interpret a CBA. *See* CPC's Br. at 16 n.54 (citing *Rose v. Erickson*, 721 p.2d 969, 971 (Wash. 1986), which addresses the statutory interpretation of PECBA).

Treatment of Officers of Different Ranks. CPC complains that employees of different ranks are "still" treated differently, because the SPOG and SPMA CBAs are not identical. CPC's Br. at 22. The Consent Decree does not address this topic, and the two bargaining units with different contracts have existed since before the Consent Decree was entered. In addition, CPC does not explain the basis for its objection; for example, it has not pointed to any contract provision that would lead to different outcomes if an SPMA member and a SPOG member engage in the same infraction. Management employees and line-level employees are required by state law to be in separate bargaining units, and the City must bargain separately with each one. *See Kitsap County*, Dec. 12163-A (PECB 2015); *cf. Western Wash. Univ.*, Dec. 8256 (PSRA 2003) ("[T]he duty to bargain exists separately in each appropriate bargaining unit where employees have chosen to designate an exclusive bargaining representative.").

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Additional Topics Not Fully Briefed. CPC also faults the City more generally by saying that its brief "does not address" various topics. CPC's Br. at 1-2. Yet CPC does not explain how these topics are relevant to the issues before this Court. CPC had more than two months to respond to the City's brief, ample time to review the materials which are a matter of public record, and the ability to bring any potential conflicts with the Consent Decree or constitutional policing to Court's attention. But it did not do so. That is because these issues are not relevant to the Court's review.

III. CONCLUSION

For the foregoing reasons, the City requests that the Court rule that the CBAs and the Accountability Ordinance, as modified by the CBAs are consistent with and further the goals of the Consent Decree, and that the City remains in full and effective compliance with the Consent Decree.

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DATED this 6th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the following counsel of record:

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